Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

ROBERT E. LONGFELLOW,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE SUBJECTIVE BASIS FOR THE PETITIONER'S GOOD FAITH BELIEF WAS RELEVANT TO THAT BELIEF AND ITS EXCLUSION UNDERMINED THIS COURT'S HOLDING IN *CHEEK V. UNITED STATES* THAT A DEFENDANT'S SUBJECTIVE BELIEF DETERMINES HIS GOOD FAITH.

II. WHETHER THE REFINANCING OF A PRIOR LOAN IS AN EXECUTION OF A SCHEME UNDER 18 U.S.C. §1344 SO THAT ITS ALLEGATION CAN BOOTSTRAP AN INDICTMENT BASED ENTIRELY ON LOAN TRANSACTIONS BARRED FROM PROSECUTION BY THE STATUTE OF LIMITATIONS.

III. WHETHER THE COURT OF APPEALS EMASCULATED THE FIFTH AMENDMENT'S DUE PROCESS GUARANTEE AGAINST PREJUDICIAL PREINDICTMENT DELAY BY HOLDING THAT THE GOVERNMENT'S LOSS OF ALL BOARD MEETING MINUTES DURING ITS UNJUSTIFIED DELAY OF OVER SIX YEARS IN BRINGING THE INDICTMENT IN THIS CASE DID NOT BAR THE PROSECUTION BECAUSE OF *LACHES*.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on December 22, 1994, and the denial of the Petition for Rehearing on February 3, 1995.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 43 F.3d 723 (7th Cir. 1994). A copy of the opinion is included in the Appendix

as "Exhibit A". A copy of the Order denying the Petition for Rehearing is included in the Appendix as "Exhibit B".

JURISDICTION

Jurisdiction in this cause is premised upon 28 U.S.C. §1254(1) for review by certiorari of the judgment and opinion of the United States Court of Appeals for the Seventh Circuit. Petitioner in the District Court and in the Court of Appeals asserted federal claims based on the guarantees of the Fifth Amendment to the United States Constitution, the Federal Statutes of Limitations, and the Federal Rules of Evidence. A written opinion was issued by the Court of Appeals on December 22, 1994. Petitioner sought rehearing, which the court denied on February 3, 1995.

The record in this cause was lodged with the United States District Court for the Central District of Illinois, Danville Division, Danville, Illinois, with return of the mandate on February 13, 1995, but the United States Court of Appeals for the Seventh Circuit recalled the mandate on March 14, 1995, and stayed its issuance pending the filing of a petition for a Writ of Certiorari. A copy of the Order recalling the mandate and staying its issuance is included in the Appendix as "Exhibit C".

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the following provisions are set forth in the Appendix as stated: (1) The Fifth Amendment

to the United States Constitution as "Exhibit D"; (2) 18 U.S.C. §657, 18 U.S.C. §1006, and 18 U.S.C. §1344 as "Exhibit E"; and (3) 18 U.S.C. §3282 and 18 U.S.C. §3293 as "Exhibit F" and (4) Federal Rules of Evidence 401 and 402 as "Exhibit G".

STATEMENT OF THE CASE

The Petitioner, Robert E. Longfellow, was the President and Chief Executive Officer of the Grant and Ross Township Credit Union ("hereinafter referred to as the "Credit Union"). On April 22, 1993, a Superseding Indictment[1] charged the Petitioner with two counts of bank fraud under 18 U.S.C. §1344, one count of bank fraud under 18 U.S.C. §1006, and one count of embezzlement under 18 U.S.C. §657. All charges stemmed from loans that the Petitioner made to seven borrowers between December 5, 1980, and January 30, 1986, for the purchase of six parcels of real estate that he personally owned. The Petitioner authorized and executed all of the charged transactions.

a. The Loans

All counts, and the Government's evidence of fraudulent intent, derived from irregularities in the documentation created during the seven charged transactions. A

[1] The Petitioner was originally indicted on November 4, 1992, but the trial resulted in a hung jury and mistrial. The superseding indictment, filed on April 22, 1993, was substantially the same as the original indictment.

normal loan transaction, in compliance with the guidelines of the Illinois State Department of Financial Institutions (DFI) and the National Credit Union Administration (NCUA), would have a completed loan application, a completed credit report, a completed appraisal on the property, a completed promissory note, and a completed mortgage.

Also, because the Petitioner had an interest in the property, he would disclose that interest to the Credit Union's Board of Directors before the loan was approved and abstain from voting on the transaction. Once the Board approved the loan, all documents would be executed, a deed and mortgage would be recorded, and distribution would be made at a loan closing.

None of the transactions at issue in this case had all of these components. Documentation was missing or incomplete, and the Petitioner always retained title to the property.

The first loan, made to Larry and Leigh Ann Ward in December of 1980, and the second loan, made to Kenneth and Hester Byerly in April of 1982, both lacked mortgage documents. These two loans related to the same property. After the Wards fell behind in their payments in March of 1991, the Petitioner took out a loan from the Credit Union in his wife's name to pay off the Wards' obligation and recover the property. He then sold the property to the Byerlys and used the proceeds to pay off the loan in his wife's name. The Byerlys paid on their loan until the Credit Union failed in 1987, after which the Petitioner deeded the property to them.

The third loan, made to Shirley Ann Leppard in October of 1982, included an application, security agreement, promissory note and mortgage form with no writing other than Ms. Leppard's signature. Ms. Leppard abandoned the property in August of 1983 and stopped making payments. Soon after, her husband filed for bankruptcy on the loan.

The fourth loan, made to Donald Robinson in May of 1983, included an application with only Mr. Robinson's signature and a mortgage document that had never been recorded. He filed for bankruptcy in 1984, but claimed no ownership interest in the property.

Similarly, the application, promissory note, security agreement and mortgage for the fifth loan, made to Bobby Kinnaird in June of 1983, showed only Mr. Kinnaird's signature. Mr. Kinnaird refinanced his loan twice, in July of 1984 and in April of 1985, both times executing security agreements, promissory notes and mortgages with only the buyers' signatures.

The sixth loan, made to Daniel Brunner in February of 1984, also contained mostly blank documentation and lacked a recorded mortgage. Mr. Brunner sold the property in 1991 and used the proceeds to pay off the loan.

The seventh and final charged loan, made to Dani Means in January of 1986, also lacked a recorded mortgage. The Petitioner eventually transferred title to Mr. Means after the NCUA took over the Credit Union in March of 1986.

b. Regulatory Agency Involvement and Investigation

In April of 1983, after a surprise examination, the DFI issued a review comment letter and a "Cease and Desist Order" that required complete documentation on real estate loans, while acknowledging that the Credit Union generally had corrected the deficiencies. In March of 1986, however, the DFI and the NCUA took the Credit Union into conservatorship and began investigating improper loan practices with the assistance of the Federal Bureau of Investigation (FBI).

During the conservatorship, the NCUA assumed complete control over all of the Credit Union's records. Although the NCUA promised to preserve the Minutes of the Board of Directors meetings, these Minutes were lost. Since the Loan Committee reports were part of every Board Meeting, the Minutes would have reflected a listing of every loan, including those which formed the basis of the charges against the Petitioner. Over six and one half years after taking over the Credit Union, on November 4, 1992, the Government indicted the Petitioner.

c. The Timing of the Charges

The Superseding Indictment branded all of the loan transactions as being strands in the web of a larger scheme to defraud the Credit Union, but technically charged only the most recent two because all other transactions were beyond the statute of limitations. Counts I and III, based on 18 U.S.C. §1344, charged all of the loans directly as a scheme to defraud, executed by the Petitioner through the 1985 refinancing of the Kinnaird loan

and the 1986 loan to Dani Means. Count II, based on 18 U.S.C. §1006, charged only the 1985 refinancing of the Kinnaird loan as a fraudulent action by the Petitioner to obtain personal benefit. Count IV, based on 18 U.S.C. §657, charged only the 1986 loan to Dani Means as a fraudulent misappropriation of Credit Union funds.

Before trial, counsel for the Petitioner attacked the pre-indictment delay through motions based on both the statute of limitations and *laches*, because of the Government's loss of the Board Meeting Minutes. The trial court rejected both arguments.

d. The Defense

At trial, the Petitioner presented a defense of good faith, explaining that he handled each of the charged loans the same way to protect the Credit Union. By retaining title to the property in his name, the Petitioner was in a position to protect the collateral and repay the loan should the borrower default. Also, he could prevent the filing of other liens on the property during the loan's term.

The Petitioner's good faith defense had its circumstantial problems, however. By filing no mortgage and preparing no promissory note, the Credit Union could not foreclose against the property or further provide for security in the event the borrower filed bankruptcy. Also, three of the charged transactions were "roll overs" of past due loans and the resulting capitalization of interest removed those loans from the delinquent list that was always scrutinized during accounting audits.

e. The Watseka Land Purchase

In order to show that the motivation behind his handling of the charged loans was to protect the Credit Union, the Petitioner offered evidence of an earlier transaction that was approved by the Credit Union's Board and the Credit Union's attorney, in which the Petitioner held one hundred percent of the beneficial interest in land that the Credit Union itself purchased. The trial court ruled the evidence irrelevant and inadmissible.

Between 1978 and 1982, the Credit Union had acquired a branch office in Watseka. Credit Union funds were used to purchase the property but, since the DFI had not yet approved the purchase, the Credit Union followed its attorney's advice and placed title in a land trust with one hundred percent of the beneficial interest of that trust held in the Petitioner's name.

The Government at first stipulated to the foundation for Petitioner's documentary exhibits detailing the Watseka transaction, but then objected when counsel referred to the documents while examining witnesses. In an offer of proof, the Petitioner testified that he believed, on the basis of the Watseka transaction, that the control of the title and not the technical legal holding of the title was important in transactions affecting the interests of the Credit Union. He felt that the charged transactions, in which he also controlled the title to the properties, for the benefit of the Credit Union, were no different.

The trial court sustained the Government's objection to this evidence as irrelevant, stating:

> There is no parallel at all between this situation in which Mr. Longfellow acting for the credit

> union, on behalf of the credit union, at the direction of the credit union, to acquire a goal of the credit union, whether the method that they used was right or wrong is in any way similar to his using credit union money to finance purchase of property which he personally owns, that wasn't for the benefit of the credit union. So the objection is sustained on the basis of relevance.
>
> * * *
>
> It is my function to decide what a reasonable inference is and I rule that no person could draw a reasonable inference of lack of intent to defraud from this transaction. . . .

The Petitioner was convicted on all counts of the Superseding Indictment. He filed a timely post-trial motion, which was denied. On March 21, 1994, the trial court sentenced the Petitioner to three years imprisonment, a fine of fifty thousand dollars and restitution in the amount of sixty-seven thousand three hundred forty-two dollars and two cents plus costs of suit.

f. In the Appellate Court

On appeal to the United States Court of Appeals for the Seventh Circuit, the Petitioner argued that the trial court improperly excluded evidence relevant to his good faith belief and that the indictment was barred by the statute of limitations and by *laches*. On December 22, 1994, the Court of Appeals affirmed the Petitioner's conviction.

REASONS FOR GRANTING THE WRIT

I.

THE SUBJECTIVE BASIS FOR THE PETITIONER'S GOOD FAITH BELIEF WAS RELEVANT TO THAT BELIEF AND ITS EXCLUSION UNDERMINED THIS COURT'S HOLDING IN *CHEEK V. UNITED STATES* THAT A DEFENDANT'S SUBJECTIVE BELIEF DETERMINES HIS GOOD FAITH.

This case presents the opportunity to prevent the erosion of the least controversial element of this Court's holding in *Cheek v. United States*, 498 U.S. 192, 111 S.Ct. 604 (1991). The Petitioner's unremarkable attempt to introduce as evidence of his good faith belief the subjective basis for that belief met with inexplicable hostility from the District and Appellate Courts, which cast aside *Cheek*'s holding that the reasonableness of a defendant's belief is irrelevant to a determination of good faith.

The crimes with which the Petitioner was charged were all specific intent crimes to which good faith was a complete defense. *E.g., United States v. Heath*, 970 F.2d 1397, 1407 (5th Cir. 1992) (interpreting 18 U.S.C. §657), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1643 (1993); *United States v. Ratchford*, 942 F.2d 702, 706-07 (10th Cir. 1992) (interpreting 18 U.S.C. §1006), *cert. denied*, 502 U.S. 1100, 112 S.Ct. 1185; *United States v. Sims*, 895 F.2d 326, 329 (7th Cir. 1990) (interpreting 18 U.S.C. §1344). The Petitioner presented his good faith in making the loan transactions as his only defense.

The Petitioner sought to bolster his testimony that he acted in good faith, which often is all a defendant can present towards establishing that defense, with evidence

of a prior transaction in which the Credit Union employed some, although admittedly not all, of the irregular techniques employed by the Petitioner in the charged transactions. When the Credit Union sought to purchase land for a branch in Watseka, the Petitioner held one hundred percent of the beneficial interest in the land. This form was approved by the Board and the Credit Union's attorney.

The connection between this transaction and the charged transactions was the Petitioner's subjective belief. In his offer of proof, the Petitioner testified, "Based on that [Watseka] transaction, I felt like the substance of the transaction was important and not the technicality of it." When asked how the Watseka transaction affected his thinking on a charged transaction, the Petitioner replied, "I felt there was no difference in the transactions and it would be legal."

The District Court and the Court of Appeals rejected this evidence because they could not see a reasonable parallel between the Watseka transaction and the charged transactions. The District Court held, "It is my function to decide what a reasonable inference is and I rule that no person could draw a reasonable inference of lack of intent to defraud from th[e Watseka] transaction." The Court of Appeals stated that no precedent "require[s] that any evidence, no matter how tangential, irrelevant or otherwise inadmissible, must be admitted simply because the defendant claims that it establishes his good faith." *United States v. Longfellow*, 43 F.3d 318, 321-22 (7th Cir. 1994); App. 8. Both courts pointed out the factual dissimilarities in the Watseka transaction, where the

Petitioner had the specific approval of the Board of Directors and the Credit Union's attorney.

Both courts ignored the fact that the Petitioner's testimony provided the only inference necessary. The Petitioner sought to establish not that the transactions actually were similar but, rather, that the Petitioner *thought* the transactions were similar. This Court specifically held in *Cheek*, 498 U.S. at 203, 111 S.Ct. at 611, that the inquiry into a defendant's good faith focuses entirely on his subjective beliefs at the time, regardless of the reasonableness of those beliefs. This holding was uncontroversial. The more radical holding of *Cheek*, that a defendant's subjective ignorance of the law may be a defense, was not even involved in this case.

The District Court's ruling can only be understood as a thinly disguised finding that the Petitioner was lying when he said that the structure of the Watseka transaction made him think that the form of his later transactions was a proper and effective way to protect the Credit Union. This determination was for the jury. "Knowledge and belief are characteristically questions for the factfinder, in this case the jury. Characterizing a particular belief as not objectively reasonable transforms the inquiry into a legal one and would prevent the jury from considering it." *Cheek*, 498 U.S. at 203, 111 S.Ct. at 611.

Of course, the reasonableness of a defendant's good faith belief "is a factor for the jury to consider in determining whether a defendant actually believed and acted on it." *United States v. Benson*, 941 F.2d 598, 614 (7th Cir. 1991), *opinion amended*, 957 F.2d 301 (7th Cir. 1992). The

jury here, however, was never given the chance to evaluate the sincerity of the Petitioner's belief based on the reason for that belief.

The Seventh Circuit's holding conflicts even with its own ruling in *United States v. Martin-Trigona*, 684 F.2d 485 (7th Cir. 1982). In that case, a defendant was charged with mail fraud after he sent allegedly false representations that he owned real estate to a bank in order to obtain a mortgage on that property. *Martin-Trigona*, 684 F.2d at 487. The defendant tried to prove he acted in good faith by presenting evidence that he believed he held equitable title, but the trial court excluded that evidence. The Seventh Circuit overturned the conviction, stating, "To the extent that Martin-Trigona sought to introduce evidence consistent with such a good faith defense, the trial court erred in excluding it." *Id.* at 492.

This Court held in *Cheek* that a defendant's subjective belief is not only consistent with a good faith defense, but is its very essence. This Court should grant certiorari in this case to bring the Seventh Circuit's ruling in line with the mandate of *Cheek* and the proper definition of good faith.

II.

THE REFINANCING OF A PRIOR LOAN IS NOT AN EXECUTION OF A SCHEME UNDER 18 U.S.C. §1344 AND ITS ALLEGATION CANNOT BOOTSTRAP AN INDICTMENT BASED ENTIRELY ON LOAN TRANSACTIONS BARRED FROM PROSECUTION BY THE STATUTE OF LIMITATIONS.

This case also presents the opportunity for this Court to establish much-needed guidelines for determining whether an act is an "execution" of a scheme to defraud under 18 U.S.C. §1344. The proper guidelines must exclude from the definition of "execution" the mere refinancing of a loan from one bank already completed, for the purchase of one piece of property, where no money changes hands.

Count I of the Superseding Indictment alleged a scheme to defraud based on acts from 1980 to 1985, only one of which, the 1985 refinancing of the Kinnaird loan, was within the statute of limitations. The limitations period applicable to financial institution offenses is ten years. 18 U.S.C. §3293. That limitations statute, however, became effective on August 9, 1989, and permitted retrospective application only if the limitations period applicable to an offense had not already run. Prior to the enactment of §3293, the applicable statute of limitations, 18 U.S.C. §3282, imposed a five-year limitations period. Thus, the viability of the Petitioner's prosecution under Count I depended entirely upon the characterization of

the 1985 refinancing as an "execution" of the scheme to defraud.[2]

The Courts of Appeals have struggled with defining the proper act punished by 18 U.S.C. §1344. Generally, courts have recognized that §1344, unlike the mail fraud statute, 18 U.S.C. §1341, punishes only executions of schemes to defraud and not all acts in furtherance of the schemes. *See, e.g., United States v. Molinaro*, 11 F.3d 853, 860 (9th Cir. 1993), *cert. denied sub nom. Mangano v. United States*, ___ U.S. ___, 115 S.Ct. 668 (1994); *United States v. Lilly*, 983 F.2d 300, 304 (1st Cir. 1992); *United States v. Lemons*, 941 F.2d 309, 318 (5th Cir. 1991).[3]

Drawing the line between executions and acts in furtherance, however, is difficult, as the Court of Appeals for the Seventh Circuit lamented in this case. *Longfellow*, 43 F.3d at 325; App. 17 (stating, "Admittedly, this presents a question without clear precedent, which is therefore of considerable difficulty. . . . ")

The Courts of Appeals have struggled, but generally look at the independence of the acts. In *Heath*, 970 F.2d 1397, the defendants executed a scheme to defraud a bank involving two loans taken out by different parties

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[2] In fact, the 1985 financing was the only act alleged in Count I that occurred after the passage of 18 U.S.C. §1344 on October 12, 1984.

[3] This approach is not inviolate, however. *See United States v. DePietro*, 1993 WL 79499, No. 2:92-CR-89 (D. Conn. Jan. 13, 1993) (explicity rejecting the analysis of *Lemons*, 941 F.2d 309, and holding that "execute" under §1344 means the same as "act in furtherance of a scheme" under §1341).

for the purchase of two different properties in two different states. The Fifth Circuit held that the Government could not charge the defendants with multiple violations of §1344 based on these two loans because they were only multiple steps in executing one scheme. *Heath*, 970 F.2d at 1402. The court stated:

> The two loans . . . were integrally related; one could not have succeeded without the other. Indeed, the sale of the Phoenix property was conceived for the sole purpose of facilitating the Florida sale.
>
> Although a two-loan scheme may subject an institution to greater risk than a scheme involving only one transaction, it is the execution of the scheme itself that subjects a defendant to criminal liability, not, as we stated in *Lemons*, the execution of each step or transaction in furtherance of the scheme.

Id. See also, Molinaro, 11 F.3d at 860 (holding that separate transfers of property were separate executions because "[n]one depended on the others for its existence" and "[e]ach had its own functions and purpose"); *Lilly*, 983 F.2d at 303 (holding that twenty-nine falsified mortgages assigned to a bank in order to obtain a single loan were not separate executions of the scheme because they were all intended to defraud a single bank in connection with a single loan).

Of course, a single scheme may have multiple executions, as the Courts of Appeals have recognized. *See United States v. Wall*, 37 F.3d 1443, 1446 (10th Cir. 1994) (holding that separate loans to separate borrowers that

were not related in any essential way were separate executions of the scheme); *United States v. Brandon*, 17 F.3d 409, 423 (1st Cir. 1994) (holding that separate loans to separate buyers from a single bank were separate executions of the scheme), *cert. denied sub nom. Granoff v. United States*, ___ U.S. ___, 115 S.Ct. 80; *United States v. Poliak*, 823 F.2d 371, 372 (9th Cir. 1987) (holding that each separate check in a check-kiting scheme was a separate execution), *cert. denied*, 485 U.S. 1029, 108 S.Ct. 1586 (1988). In these cases, each act was separate and independent.

The Seventh Circuit in this case, however, utilized a much broader definition of "execution" in order to reach the refinancing of a loan already made. The court defined "execution" in the negative and announced that in order for an act to fail as an execution, it would have to be "part of a 'single,' 'integrally related' act, closely planned and carried out in connection with the [original] transaction." *Longfellow*, 43 F.3d at 325; App. 16 (citations omitted).

This definition unduly broadened the scope of §1344 in order to reach a refinancing that was not an independent act and placed the Seventh Circuit at odds with cases in other Circuits. The refinancing could not exist independently of the original loan. It did not create a new risk; it merely continued an old risk.

The Seventh Circuit focused on the fact that the refinancing prevented the discovery of the original loan, *Id.* at 324; App. 15, but every act in furtherance of a scheme plays a role in that scheme. The Ninth Circuit in *Molinaro*, 11 F.2d at 860, held that the listing of phony

purchasers in a real estate transaction was not an execution of the scheme because it was "made solely to conceal [the defendant's] role in the transaction . . . , which had already been consummated." In this case, the real estate transaction had already been consummated and the refinancing merely concealed the Petitioner's role in that past transaction.

The Seventh Circuit also focused on the fact that the refinancing created a new, independent risk for the Credit Union. *Longfellow*, 43 F.3d at 324; App. 15. The Fifth Circuit in *Heath*, 970 F.2d at 1402, however, explicitly rejected that analysis, holding that "[a]lthough a two-loan scheme may subject an institution to greater risk than a scheme involving only one transaction, it is the execution of the scheme itself that subjects a defendant to criminal liability, not . . . the execution of each step or transaction in furtherance of the scheme."

The Seventh Circuit also focused on the fact that the refinancing was not planned along with the original loan, but was entered into two years later. *Longfellow*, 43 F.3d at 324; App. 15-16. The Fifth Circuit, however, has held that a defendant's later attempts to withdraw from an account he had created with bogus deposits were not executions of his scheme because "[t]he attempted withdrawals were integrally related to the deposits, and could not have succeeded without them." *United States v. Hord*, 6 F.2d 276, 281 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1551 (1994). This conclusion would not change, regardless of how much time passed between the deposits and the withdrawals.

The definition of "execution" under §1344 is an important issue of first impression for this Court, upon which the Courts of Appeals are floundering. It is the relationship between the two acts and the dependency of one upon the other that properly determine whether that act is or is not an execution. This Court should grant certiorari to provide that much-needed guidance for the Courts of Appeals.

III.

THE COURT OF APPEALS EMASCULATED THE FIFTH AMENDMENT'S DUE PROCESS GUARANTEE AGAINST PREJUDICIAL PRE-INDICTMENT DELAY BY HOLDING THAT THE GOVERNMENT'S LOSS OF ALL BOARD MEETING MINUTES DURING ITS UNJUSTIFIED DELAY OF OVER SIX YEARS IN BRINGING THE INDICTMENT IN THIS CASE DID NOT BAR THE PROSECUTION BECAUSE OF *LACHES*.

Finally, this case presents an important issue regarding the due process guarantees of the Fifth Amendment. Due process protects a defendant from an unreasonable delay in prosecution. *United States v. Lovasco*, 431 U.S. 783, 790-91, 97 S.Ct. 2044, 2048-49 (1977); *United States v. Gouveia*, 467 U.S. 180, 193, 104 S.Ct. 2292, 2299-300 (1984) (holding that the Government's delay in bringing an indictment which disadvantages the defendant can bar prosecution). The reason for this protection is that the "[p]assage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his

ability to defend himself." *United States v. Marion*, 404 U.S. 307, 322, 92 S.Ct. 455, 464 (1971).

In this case, the Government offered no excuse for its delay in indicting the Petitioner. Even the Seventh Circuit noted disapprovingly that the delay was for "no good reason." *Longfellow*, 43 F.3d at 326; App. 15. During this delay, the Government lost all of the Minutes for the Meetings of the Credit Union's Board of Directors. The Seventh Circuit felt compelled to reject the Petitioner's argument that this loss prejudiced his case, however, because he did not "specifically allege that the Minutes would show that the Board of Directors were aware of the transactions or that they approved them." *Id.*

The Seventh Circuit ignored the prejudice and emasculated the due process protection. The Credit Union's Loan Committee made a presentation in writing and orally at every Board Meeting that reflected a listing of every single loan, including those which formed the basis of the charges against the Petitioner. Several Officers and Board members testified that they knew of the Petitioner's transactions and the Minutes would have revealed whether this knowledge was imparted to the full Board.

The value of this evidence cannot be overstated; nothing less than full exoneration was at stake. The NCUA took over the Credit Union and then sat on the documents until they disappeared and all memory of their contents faded. This is precisely the injustice that due process is meant to prevent through *laches*. The Petitioner was denied due process by the pre-indictment delay in this case, and this Court should grant certiorari

to give teeth to the Fifth Amendment's guarantee against prejudicial pre-indictment delay.

CONCLUSION

This Court should grant a writ of certiorari to review the judgment and order of the United States Court of Appeals for the Seventh Circuit because of the significant issues presented regarding a defendant's right to present evidence of his subjective good faith belief in federal bank fraud prosecutions, the proper definition of an "execution" of a scheme to defraud under 18 U.S.C. §1344 and the continuing vitality of the Fifth Amendment Due Process Clause's guarantee against unjustified and prejudicial pre-indictment delay.

Respectfully submitted,

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EXHIBIT A

In the

United States Court of Appeals

For the Seventh Circuit

No. 94-1629

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT LONGFELLOW,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois.
No. 92 CR 20058 – **Harold A. Baker,** *Judge.*

ARGUED SEPTEMBER 16, 1994 – DECIDED DECEMBER 22, 1994

Before CUMMINGS, CUDAHY and RIPPLE, *Circuit Judges.*

CUDAHY, *Circuit Judge.* Robert Longfellow appeals his conviction for bank fraud, false reporting to a credit union and embezzlement from a credit union on evidentiary, statute of limitations and laches grounds. We affirm.

At all times relevant to this case, Robert Longfellow was President and Chief Executive Officer of Grant and Ross Township Community Credit Union in Hoopeston, Illinois (Credit Union). In March of 1986, the Illinois State

Department of Financial Institutions (DFI) and the National Credit Union Administration took control of the Credit Union. After the takeover, officials from DFI and the Federal Bureau of Investigation reviewed files and interviewed employees concerning alleged improprieties in loans to Credit Union customers. Following this investigation, in November 1992 Longfellow was indicted for perpetrating a scheme to defraud the Credit Union. In a series of real estate transactions between 1980 and 1984, Longfellow allegedly made loans to borrowers so that they might buy property that he owned, failed to properly prepare and record the deeds and mortgages establishing the Credit Union's interest in these loans and property, and concealed his interest in these transactions from the other directors of the Credit Union. Longfellow's first trial in March of 1993 ended in a hung jury; he was reindicted and in a second trial in November 1993 was convicted of violating 18 U.S.C. §1344(2) (bank fraud), 18 U.S.C. §1006 (false reports to a credit union) and 18 U.S.C. §657 (embezzlement from a credit union). He was subsequently sentenced to three years imprisonment, $50,000 in fines and $67,342.02 in restitution.

I. Facts

Robert Longfellow began working for the Credit Union in the late 1950s, became its full-time Manager in the 1960s and at the time of these alleged incidents had become President and Chief Executive Officer. While holding this position he made a series of loans to Credit Union members, which the members in turn used to purchase property owned by Longfellow. These transactions were neither fully nor properly recorded, and the

titles to the property were left in Longfellow's name rather than being transferred to the Credit Union as collateral for the loans.

Longfellow asserts that he acted in the best interest of the Credit Union, and that he kept title to the property in his name because he intended to pay off the loans should problems arise.

The first such sale that Longfellow arranged was the purchase in December 1980 of Longfellow's lot and trailer by Larry and Leigh Ann Ward. Longfellow authorized a loan from the Credit Union for the $10,500 purchase price, prepared the documentation himself and kept the title to the property in his name. When the Wards failed to meet their payments in March of 1991, Longfellow took out a loan in his wife's name from the Credit Union and used that money to pay the balance of the Wards' loan.

Once he had recovered the lot and trailer from the Wards by paying off the loan, Longfellow resold the property to the Byerlys for $12,500, again authorizing a loan, completing the paperwork himself and retaining the title to the trailer and land. The money from this sale was used to pay off the earlier loan in his wife's name. The Byerlys continued to pay on *their* loan until the Credit Union failed, at which point Longfellow deeded the property to the Byerlys.

In the third transaction, Longfellow sold another trailer and lot to Shirley Ann Leppard in October of 1982, again with a loan authorized by Longfellow and with no transfer of title as evidence by the deed. The documents of sale were left blank except for Leppard's signature.

After about a year, Leppard abandoned the trailer and stopped making payments.

In February of 1983, a DFI examiner performed a surprise examination of the Credit Union, finding a real estate loan file with incomplete documentation (a promissory note signed in blank). The examiner testified at trial that the Credit Union already had a history of incomplete documentation, that he explained to Longfellow and the other directors of the Credit Union that the blank note violated the Illinois Credit Union Act and that he had issued a "Cease and Desist" order citing the Credit Union for the incomplete note. Mr. Longfellow promised the examiner that in the future files relating to transactions would be completed.

Longfellow next sold a lot and mobile home to Donald Robinson in May 1983. Robinson already had an existing loan at the Credit Union, which was "rolled over" and added to the purchase price of the real estate. The mortgage was never recorded, nor was the deed transferred from Longfellow to Robinson. Robinson filed for bankruptcy one year later.

In June of 1983, Bobby Kinnaird also purchased a mobile home and lot from Longfellow, and also had a pre-existing loan rolled over and added to the price of the real estate. The promissory note, security agreement and mortgage were signed by the purchaser, but were otherwise blank. The loan was refinanced twice, first on July 31, 1984 and again in April 1985. The loan was apparently never paid, and Longfellow retained title to the property.[1]

---

[1] One of the significant problems with this appeal is the failure by both parties to provide specific facts – a failing

The next sale was in February of 1984, when Daniel Brunner purchased a small house and lot from Longfellow, again with a loan Longfellow obtained for him from the Credit Union. Brunner subsequently received a second loan from the Credit Union to build a garage on the property. Once again, the documents were left mostly blank. The title to the property was never given to Brunner, although he did eventually pay off the loan after he sold the house in August of 1991.

Finally, Dani Means bought a house and lot from Longfellow in January of 1986. Once again, Longfellow arranged for an existing loan of Means' to be "rolled over" and combined with the purchase price, even though Means was already behind in his payments on the existing loan.

In March of 1986, the Illinois Department of Financial Institutions and the National Credit Union Administration took control of the Credit Union and began the process of investigating allegations of improprieties in loans to Credit Union customers.

II. Analysis

Longfellow raises three issues on appeal, 1) that the district court committed reversible error in refusing to admit evidence of an unrelated land transaction in Watseka, Illinois because that evidence was relevant to Longfellow's motive and good faith defense, 2) that this

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particularly of defendant Longfellow. We have construed the facts as best we can, given the somewhat sketchy information in the briefs and record.

prosecution was barred by the Statute of Limitations, and 3) that the prosecution was barred by the equitable doctrine of Laches.

A. Watseka Land Transaction

Longfellow argues that he should have been permitted to present evidence regarding an unrelated purchase of land by the Credit Union in Watseka, Illinois. He claims that the details of this purchase, although unrelated to the sales of his own real estate in question here, will explain why he believed that keeping the title to real estate in his own name would be beneficial to the Credit Union.

In the Watseka transaction, the Credit Union sought to purchase land to open a branch in Watseka. However, before the Credit Union could officially purchase the land and hold title in its own name, it was required to obtain permission from the DFI. Because another organization was also trying to purchase the building in question, forcing the Credit Union to move quickly, the Board of Directors approved the purchase under Longfellow's name. The Credit Union's attorney prepared the paperwork, and the building was purchased and held in trust, with Longfellow holding all of the beneficial interest in the trust. On the advice of the Credit Union's attorney, Longfellow also signed a blank "assignment of beneficial interest," permitting his interest to be transferred to the Credit Union at any time.

The Credit Union then petitioned the DFI for permission to purchase the building. At first the permission was refused, and the DFI issued a Cease and Desist order

because the Credit Union had not acquired prior approval. After repeated requests by the Credit Union's attorney and Board of Directors, however, the DFI approved the transfer of title to the Credit Union, with the understanding that the loans that Longfellow had received to purchase the building would be canceled upon completion of the transfer. Def. Br. at 25.

Longfellow contends that this transaction taught him that it was beneficial to the Credit Union for him to keep title to property in his name, and that Cease and Desist orders were not matters of great importance. The district court excluded this evidence on relevance grounds.

Longfellow argues that *United States v. Rubin*, 591 F.2d 278 (5th Cir.), *cert. denied*, 444 U.S. 864 (1979), and *United States v. Martin-Trigona*, 684 F.2d 485 (7th Cir. 1982), require that the Watseka evidence be admitted because it goes to his good faith defense. In *Rubin*, the defendant was accused of embezzling union funds and claimed lack of criminal intent as a defense. He argued that statements made by past presidents of the Union led him to understand that his actions in disbursing funds were proper under the Union's constitution, and that these statements were therefore improperly excluded as hearsay. The court concluded that the statements were not hearsay because they were not offered for the truth of the matter asserted, and that, because they were directly relevant to the defendant's intent, they should have been admitted.

In *Martin-Trigona*, the defendant was accused of mail fraud and had been prohibited from presenting any evidence of his good faith or lack of intent to defraud.

Noting that it was difficult to determine exactly what good faith evidence the defendant had been trying to introduce, this Court ascribed its confusion to the fact that the defendant had also been improperly denied effective counsel. Thus we concluded that the defendant was entitled to introduce any legitimate good faith evidence that he had, and we remanded for further proceedings.

Rubin and *Martin-Trigona* certainly stand for the unexceptionable proposition that proper evidence of good faith should be admitted. However, they do not require that any evidence, no matter how tangential, irrelevant or otherwise inadmissible, must be admitted simply because the defendant claims that it establishes his good faith. Here, the district court allowed other evidence of Longfellow's good faith, but concluded that there was "no parallel at all" between the Watseka situation, where Longfellow was acting "on behalf of the Credit Union, at the direction of the Credit Union, to acquire a goal of the Credit Union," and the transactions where Longfellow was selling his own property without informing anyone at the Credit Union. Tr. at 455.

We will not reverse the district court's evidentiary ruling absent an abuse of discretion. *United States v. Fryer*, 974 F.2d 813 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2418 (1993); *United States v. Biesiadecki*, 933 F.2d 539 (7th Cir. 1991). In the Watseka transaction Longfellow not only in formed the Board of Directors of his actions, but had their permission and help as well as that of the Credit Union's attorney. None of these factors were present in the transactions in the present case. There was no abuse of discretion here.

B. Statute of Limitations

Longfellow next argues that Count I of the indictment, charging him with defrauding a bank in violation of 18 U.S.C. §1344, was barred by the Statute of Limitations.

The parties do not dispute that the Statute of Limitations for financial institution crimes was five years at the time that Longfellow made his loans. They also agree that 18 U.S.C. §3293, which took effect in August of 1989, established a new ten-year Statute of Limitations for financial institution crimes. Application of the new ten-year period is retroactive to crimes committed before the enactment of §3293 in August of 1989, but only if the previous five-year Statute of Limitations on the alleged incident had not already expired by that time. Pub.L. 101-73 §961(1)(3). Thus, Longfellow's 1992 indictment can only involve those acts whose five-year Statute of Limitations had not run before August of 1989, or in other words, those acts that occurred after August 1984.

The bank fraud statute, 18 U.S.C. §1344, provides that:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice –
>
> > (1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Longfellow questions his conviction, under Count I of the indictment, for violating this statute. Count I charges generally that Longfellow defrauded the Credit Union by failing to provide proper documentation, neglecting to perform credit checks on borrowers, making loans for purchases of property that belonged to him, making false statements on documents and failing to obtain the approval of the Board of Directors. It lists the April 1982, October 1982, May 1983, June 1983, July 1984 and February 1984 loans as part of the scheme and gives the April 1985 refinancing of the Kinnaird loan as the "execution" of this scheme on which this Count is based.

Longfellow contests the use of these loans in Count I. He argues that each loan is a separate execution of the scheme, and that all except the refinancing of the Kinnaird loan are old enough to be barred by the Statute of Limitations. He further argues that the refinancing of the Kinnaird loan is not an "execution" under §1344, but is instead essentially a continuation of a prior transaction and execution (the original loan to Kinnaird), which occurred in 1983 and for which he could have been indicted in 1983. The Statute of Limitations began to run on the original Kinnaird loan in 1983, and expired before the 1989 extension of the Statute of Limitations for financial institutions. Thus, Longfellow concludes, Count I of the indictment is invalid on Statute of Limitations grounds. Only if the refinancing of the Kinnaird loan in 1985 itself constitutes an "execution" of the scheme can Count I be brought within the Statute.

Determining exactly what constitutes an "execution" of a scheme is difficult. It is fairly well established that the bank fraud statute "punish[es] each execution of a fraudulent scheme rather than each act in furtherance of such a scheme." *United States v. Molinaro*, 11 F.3d 853, 859 (9th Cir. 1993), *cert. denied*, 63 U.S.L.W. 3388 (Dec. 12, 1994); *United States v. Hord*, 6 F.3d 276, 281 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1551 (1994); *United States v. Heath*, 970 F.2d 1397, 1402 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1643 (1993); *United States v. Lemons*, 941 F.2d 309, 318 (5th Cir. 1991); *United States v. Lilly*, 983 F.2d 300 (1st Cir. 1992); *United States v. Schwartz*, 899 F.2d 243, 248 (3d Cir.), *cert. denied*, 498 U.S. 901 (1990). However, a single scheme can be executed a number of times. *See, e.g., Hord*, 6 F.3d at 282; *United States v. Hammen*, 977 F.2d 379, 382-83 (7th Cir. 1992); *Lemons*, 941 F.2d at 318. While "for each count of conviction there must be an execution," "[e]ach execution need not give rise to a charge in the indictment." *Hammen*, 977 F.2d at 383. Further, §1344 was intended to be "construed broadly," and "actions that tend to prove the existence of the scheme will often be the actions actually taken to execute the scheme." *Hammen*, 977 F.2d at 383.

Attempts to define "execution" usually arise in the context of multiplicitous indictment analyses. Each act by the defendant may be labeled as either a simple, nonindictable "act in furtherance of a scheme," or an actual, chargeable "execution." Thus an execution is generally defined in terms of what it is not (the lesser "act in furtherance of the scheme"), and depends upon "the particular facts of each case." *Molinaro*, 11 F.3d at 853. The Ninth Circuit recently provided one of the few, if not the

only, clear statement on the issue when it explained that a number of actions were indeed separate executions because they were "chronologically and substantively independent[,] [n]one depended on the others for its existence, [and] [e]ach had its own functions and purpose – they were interrelated only because they involved the same overall scheme." *Molinaro*, 11 F.3d at 860. In the case before us, the 1985 refinancing seems "chronologically" independent but whether it was "substantively" independent may be questioned.

Most courts considering the issue of whether an action was an "execution" have applied an "interrelatedness" standard in deciding exactly what parts of a scheme are executions. The ultimate goal of the scheme, the nature of the scheme, the benefits intended, the interdependence of the acts, the number of parties involved and many other individual factors are all considered. As a result, a few courts have found seemingly separate acts to constitute only one execution. For example, in *United States v. Lilly*, 983 F.2d 300, the defendant's goal was to purchase a condominium complex. To do so he pre-sold the individual condominiums, falsifying documents and loan applications in the process, and then assigned the sales agreements to the bank as security for a loan to purchase the complex. Because all the documents were submitted together as security for one loan, the court held that together they constituted only one execution. *Id.* at 303. In this connection, it should be noted that the relevant events in this transaction were *not* chronologically separate.

Similarly, in *United States v. Heath*, 970 F.2d 1397, the defendants were attempting to sell a parcel of land in

Florida that was rapidly decreasing in value. By falsely representing the value of the land, the defendants were able to convince a bank to lend ten million dollars to a buyer. However, the defendants also had to arrange for the bank to fund the purchase of some of the buyer's property in Arizona to enable him to pay the interest on the Florida loan. The court held that although there were two separate loans, the two loans were "integrally related" (one execution) because they were planned together, the Arizona loan was a prerequisite to the ultimate goal of the scheme (the sale of the Florida property) and "one could not have succeeded without the other." *Id.* at 1402. Again, there was also little chronological separation between the two loans.

Finally, in *United States v. Lemons*, 941 F.2d 309, the defendant arranged for his savings and loan institution to make a large loan to a buyer of a real estate project. Part of the loan went to pay an assignment fee to yet another participant, from whom the defendant was to receive part of this assignment fee for himself. When the defendant finally was poised to receive the assignment fee he tried to prevent its discovery by arranging to get it in a series of transactions over six months rather than in one lump sum. The Fifth Circuit found that the goal of the scheme was to receive the assignment fee, and that even though it was divided up and disbursed in separate transactions, they were all part of "one performance, one completion, one execution of [a] scheme." *Id.* at 318. In *Lemons*, the defendant made plans to hide his gain the minute he was entitled to receive the money. The series of transactions to effectuate this deception covered a six-month period, but these transactions were all planned and contemplated at

the time he was to receive the payment and they created no new gain for Lemons or risk for the bank. Hence, there was little basis to regard them as independent transactions.

However, many other cases of bank fraud have involved multiple, "separate and distinct" acts, and these cases have been held to include multiple executions. *Hord*, 6 F.3d at 280; *Lemons*, 941 F.2d at 316. *United States v. Hord* involved a scheme to deposit forged checks and then withdraw the money credited to the account, and each deposit was held to be a separate execution. 6 F.3d 276. The *Hord* court concluded that each deposit was a separate execution because "each deposit [put the bank] at risk," and the deposits "were not integrally related to one another, such that none could have succeeded without the others." *Id.* at 282. The court also held that the deposits were the executions of the scheme, rather than the opening of the bank accounts or the withdrawal of the money, because the deposits were what put the bank at risk.

Similarly, in *Molinaro*, 11 F.3d 853, the Ninth Circuit found each transfer of property to be an execution in a scheme where straw buyers purchased property to make a savings and loan look profitable and to conceal the real purchaser. However, falsifying the documentation to hide the real buyer in one of these transfers was not a separate execution. *See also Schwartz*, 899 F.2d at 248 (each deposit of fraudulent checks into account at single bank was separate execution); *United States v. Poliak*, 823 F.2d 371 (9th Cir. 1987) (each check in a check-kiting scheme is a separate execution), *cert. denied*, 485 U.S. 1029 (1988).

Returning to the case at hand, Longfellow's pattern of granting loans to facilitate the sale of his own property, failing properly to record the sale and keeping the deeds in his own name constituted a scheme under §1344. He executed the scheme a number of times when he arranged loans from the Credit Union, received the loan proceeds as payment for the property and failed to transfer title.

The question here is whether the refinancing of the Kinnaird loan also constituted a separate execution of this scheme. We face the problem that the refinancing was related to the loan made in 1983, but, on the other hand, the refinancing, like each deposit in *Hord*, created a new, independent risk for the Credit Union. Refinancing involved the granting of a new loan to the borrower because the refinanced loan capitalized (i.e. added to principal) the interest due but unpaid on the previous loan. This recalculation of principal allowed the unpaid interest to appear as a gain rather than a loss in the Credit Union's books. Refinancing also prevented the loan from appearing in the delinquent loan file, thus ensuring that both the new and old risks were hidden from the Board of Directors and the auditors.

By refinancing the loan, Longfellow was once again loaning the Credit Union's money on the basis of collateral (his real estate) that he kept in his own name. Although Longfellow himself received no additional cash as a result of the refinancing, he deprived the Credit Union of an opportunity for reimbursement through foreclosure. *See Hord*, 6 F.3d at 282 ("risk of loss, not just loss itself, supports conviction"). It is also persuasive that the first loan and the refinancing were not originally planned

or contemplated together. The refinancing was entered into much later, when circumstances changed, in order to "rescue" the original loan. These two acts were separated by two years, much longer than in other cases where only a single execution has been found.

The fact that the two loans are related, or that the same Credit Union and Credit Union member was involved in both does not necessarily make them part of the same execution. *See, e.g., Hord,* 6 F.3d at 282 (same victim does not prove only one execution). We believe that the refinancing can be held to be a separate execution, carried out long after the original loan. The refinancing was not part of a "single," "integrally related" act, *Lilly,* 983 F.2d at 303, *Heath,* 970 F.2d at 1402, closely planned and carried out in connection with the 1983 transaction. Rather, it was a separate act that created a new risk for the Credit Union and arguably involved a renewed gain for Longfellow. *See Molinaro,* 11 F.3d 853. In both granting and refinancing loans, Longfellow was using his position as Chief Executive Officer to benefit himself at the expense of the Credit Union, and despite the troublesome fact that no new cash passed to Longfellow in 1985, the refinancing can constitute an "execution" under the necessarily broad construction of §1344. *See Hammen,* 977 F.2d at 382-3.

The Government did not attempt to indict Longfellow for each execution of the scheme, presumably because the earlier executions did not fall within the Statute of Limitations. However, there were executions of the scheme that did fall within the Statute of Limitations, i.e. the refinancing of the Kinnaird loan in 1985 and the

Dani Means loan in January 1986, and the scheme continued until the Credit Union was taken out of Longfellow's hands in March of 1986. The fact that only one or two executions fell within the Statute of Limitations does not detract from the entire pattern of loans' being a scheme, and renders Longfellow no less culpable for the entire scheme.[2] Admittedly, this presents a question without clear precedent, which is therefore of considerable difficulty, but we believe that there is enough independent post-1983 conduct to satisfy the Statute of Limitations.

C. Laches

Finally, Longfellow argues that his due process rights have been violated by the Government's delay in bringing this case. This prosecution was not begun until over five years from the Credit Union's closure, and during that time some documents, including the Minutes of the Board of Directors meetings, were lost.

To obtain dismissal of an indictment on the basis of undue delay under the due process clause, Longfellow must establish that he suffered "actual and substantial

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[2] Longfellow also claims that Count II of the Indictment was barred by the Statute of Limitations, although he presents no argument on this point. Count II charges Longfellow with a violation of 18 U.S.C. §1006 (false reporting, unauthorized loan approval, or accepting profit with intent to defraud a credit union) on the basis of his refinancing of the Kinnaird loan. Again, however, the refinancing of the loan was a separate act with its own problems of incomplete documentation and false reporting, and we will not overturn the jury's finding that the refinancing of the Kinnaird loan was sufficient to constitute a violation of 18 U.S.C. §1006.

prejudice from the delay." *United States v. Windom*, 19 F.3d 1190, 1195 (7th Cir.), *cert. denied*, 115 S. Ct. 174 (1994). Furthermore, "[d]efendant's showing of prejudice must be concrete, not speculative." *United States v. Nichols*, 937 F.2d 1257, 1261 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 989 (1992); *see also Windom*, 19 F.3d at 1195.

Longfellow argues that the loss of the Board of Directors Minutes interfered with his good faith defense. However he does not make clear what he believes the minutes would show were they available. While Longfellow claims that he did discuss his transactions unofficially with a few Board members, he himself admits that he never notified the full Board of Directors that he was selling his own real estate.[3] Tr. at 474. Perhaps for this reason, he also does not specifically allege that the Minutes would show that the Board of Directors were aware of the transactions or that they approved them. Therefore, while we do not condone the Government's delay in this case, particularly since there seems to be no good reason for it, we do not find that Longfellow has established substantial prejudice.

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[3] One member of the Board of Directors testified that he and one other Board member knew that Longfellow was selling his own property, but he did not remember how he knew, did not testify that he knew about the loans or that Longfellow had informed the Board of Directors, and seemed to only know about two of the properties sold. Tr. at 418.

For the reasons above, the decision of the district court is AFFIRMED.

A true Copy:
Teste:

_____
Clerk of the United States Court of Appeals for the Seventh Circuit

EXHIBIT B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

February 3, 1995.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* No. 94-1629 v. ROBERT LONGFELLOW, *Defendant-Appellant.*	Appeal from the United States District Court for the Central District of Illinois. No. 92 CR 20058 Harold A. Baker, *Judge.*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed in the above-entitled cause, all of the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing be, and the same is hereby, DENIED.

EXHIBIT C

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

March 14, 1995

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee, No. 94-1629 v. ROBERT E. LONGFELLOW, Defendant-Appellant.	Appeal from the United States District Court for the Central District of Illinois, Danville Division. No. 92 CR 20058 Harold A. Baker, Judge.

The following is before the court:

1. **"MOTION TO STAY MANDATE"** filed 2/14/95 by counsel for the appellant, which the court construes as a motion to recall and stay the mandate.

2. **"RESPONSE TO DEFENDANT'S MOTION TO STAY THE MANDATE"** filed 3/13/95, by counsel for the appellee.

IT IS ORDERED that #1 is **GRANTED** and the mandate in this appeal is **RECALLED** and its issuance will be stayed pending the filing of a petition for a Writ of Certiorari with the U.S. Supreme Court. The clerk of the district court shall retain the record pending further court order.

EXHIBIT D

Amendment V.

No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

EXHIBIT E

18 U.S.C. §657. Lending, credit and insurance institutions

Whoever, being an officer, agent or employee of . . . any . . . credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the . . . National Credit Union Administration . . . , willfully misapplies any moneys, funds, . . . or other things of value belonging to such institution, . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both. . . .

18 U.S.C. §1006. Federal credit institution entries, reports and transactions

Whoever, being an officer, agent or employee of . . . any . . . credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by . . . the Administrator of the National Credit Union Administration, . . . with intent to defraud . . . any . . . institution . . . referred to in this section, . . . receives directly or indirectly any . . . benefits through any transaction, loan, commission, contract, or any other act of any such corporation, institution, or association, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. §1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, . . . shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. §1344. Bank fraud

Whoever knowingly executes . . . a scheme or artifice –

> (1) to defraud a federally chartered or insured financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

EXHIBIT F

18 U.S.C. §3282. Offenses not capital

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

18 U.S.C. §3293. Financial institution offenses

No person shall be prosecuted, tried, or punished for a violation of, or a conspiracy to violate . . . (1) section . . . 657, . . . 1006, . . . or 1344 . . . unless the indictment is returned or the information is filed within 10 years after the commission of the offense.

EXHIBIT G

Federal Rule of Evidence 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Federal Rule of Evidence 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible. . . . Evidence which is not relevant is not admissible.